Horse Racing Appeal Panel

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HORSE RACING APPEAL PANEL

TORONTO, ONTARIO
MARCH 29, 30, 31 and APRIL 22, 26 and 29, 2021

SB HRAP 05033 2021

NOTICE OF DECISION

IN THE MATTER OF THE HORSE RACING LICENCE ACT, S.O. 2015 C. 38 Sched. 9;
AND IN THE MATTER OF AN APPEAL BY RODNEY BOYD OF
STANDARDBRED RULING NUMBER 1098498

Dates of Hearing:	March 29, 30, 31 and April 22, 26 and 29, 2021
Horse Racing Appeal Panel (HRAP/Panel):	Anthony Williams, Panel Member Brian Newton, Panel Member John Charalambous, Panel Member
Representative for the Appellant:	Jennifer Friedman
Representatives for the Registrar:	Nicolle Pace Ashley An
Decision:	The Panel dismisses the appeal and the motion for costs but varies the penalty as set out below.

WHEREAS Rodney Boyd ("BOYD") is licensed by the Alcohol and Gaming Commission of Ontario ("Commission") as a Trainer;

AND WHEREAS on October 17, 2020, BOYD was the trainer of record of the horse "Rose Run Victoria", freeze brand number 5RM27;

AND WHEREAS on October 30, 2020, Commission Racing Officials issued Standardbred Ruling Number 1098498, wherein BOYD was issued an indefinite suspension as a result of a breach of probation of Ruling Number SB ADMIN 39/2019 (issued December 4, 2019), as a result of a Certificate of Positive Analysis for the drug Cobalt from "Rose Run Victoria", tested following the 2nd race at Woodbine Mohawk Park on October 17, 2020, in accordance with Rules 1.09, 6.14, 9.07.01(ii), 26.02.01 and 26.02.02 of the Rules of Standardbred Racing;

AND WHEREAS on November 6, 2020 BOYD filed a Notice of Appeal and a Notice of Motion requesting a stay with the Panel;

AND WHEREAS on January 27, 2021, the Panel issued Decision Number SB HRAP 05007 2021, granting a stay until March 1, 2021;

AND WHEREAS on March 29, 20, 31, and April 22, 26 and 29, 2021, the Panel convened to consider BOYD's appeal;

TAKE NOTICE that the Panel dismisses the appeal but varies the penalty as follows:

1. A monetary penalty of $5,000. Two thousand dollars of the monetary penalty is subject to a stay pending the successful completion of a further two-year probation order. The stay of the $2,000 will be rescinded upon a conviction during the period of probation for a Class 1-2 TCO2 or a Class 3 equine drug violation.

2. A full suspension of a license for a period of six months. The suspension will be divided into three parts. Part 1: 86 days, time already served.
   Part 2: 34 days from April 30, 2021 to June 2, 2021 inclusive.
   Part 3: 60 days subject to a stay pending the successful completion of a two-year probation order. The stay of the 60 days will be rescinded upon a conviction during the period of probation for a Class 3 -- Class 1-2, TCO2 or a Class 3 equine drug violation.

3. A two-year probation Order. The following terms are added to Boyd's license: two years of probation commencing June 3, 2021 to June 2, 2023 inclusive. The conditions are as follows:

   (1) the licensee shall keep the peace and be of good behaviour;
   (2) the licensee shall allow Commission inspectors access to a stabling area at any time to conduct unannounced random searches for illegal or non-therapeutic medications or drugs;
   (3) the licensee shall allow Commission inspectors to seize any illegal or non-therapeutic medications or drugs found at his stabling area;
   (4) the licensee shall be subjected to the AGCO's Out Of Competition program;
   (5) the licensee may be subject to a notice of proposed order in addition to any penalty imposed by the AGCO racing officials for any breach of the terms of the license; and
   (6) the licensee must complete the Equine Drug Use and Awareness program prior to reinstatement.

AND WHEREAS, following the Panel's oral Reasons for Decision, BOYD filed a Motion for Costs, which was objected to by the Registrar;

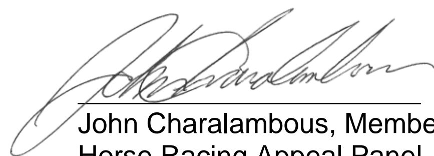
AND WHEREAS, following oral submissions by the parties, the Panel dismissed the Motion for Costs.

A transcript of the Panel's Reasons for Decision is attached to this Notice.

DATED this 9th day of July, 2021.

Anthony Williams, Member
Horse Racing Appeal Panel

Brian Newton, Member
Horse Racing Appeal Panel


John Charalambous, Member
Horse Racing Appeal Panel

HORSE RACING APPEAL PANEL (HRAP)
STANDARDBRED HEARING

IN THE MATTER OF THE *HORSE RACING LICENCE ACT, 2015*
S.O. 2015 c. 38 Sched. 9 and the
RULES OF STANDARDBRED RACING

AND IN THE MATTER OF A HEARING FOR AN APPEAL
OF RULING NUMBER:
1098498

BY APPELLANT: Rodney Boyd

Held Before:	Mr. Anthony Williams, Member
	Mr. John Charalambous, Member
	Mr. Brian Newton, Member

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This is the transcription of the proceedings in the above-mentioned matter held before the HORSE RACING APPEAL PANEL, Re: RODNEY V. BOYD, taken before PROFESSIONAL COURT REPORTERS INC., 4950 Yonge Street, Suite 802, Toronto, Ontario, via electronic video hearing on the 29th day of April, 2021.

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A P P E A R A N C E S

Ms. Nicolle Pace Ms. Ashley An	for the Registrar, Alcohol and Gaming Commission
Ms. Jennifer Friedman	for the Appellant

MS. ROZBICKA: Just a second. And we are on record. Okay, wonderful. And I'm just going to bring in the panel. Okay. Good afternoon, Panel. We're just waiting on one more. Good afternoon. And Mr. Wiskin, we are all present.

MR. WISKIN: Okay, great. Thank you. Alison may we go on the record, please?

COURT REPORTER: We're on record.

MR. WISKIN: Thank you very much. And good afternoon. Yeah, still afternoon. Okay. Good afternoon, everyone. Our continuing Horse Racing Appeal Panel hearing is now in session. Again, presiding over the proceedings is Appeal Panel Member Anthony Williams along with Appeal Panel Members, Brian Newton and John Charalambous. Mr. Chair, we are on the record and ready to proceed. Oh, you're on mute, Mr. Chair.

MEMBER WILLIAMS: Eventually, I may learn a little bit more about this unusual device. First, good afternoon to the representatives of both parties and others gathered here today. The Panel required some further time to canvass some of the outstanding matters. We're now in a position to proceed. I'm going to canvass certain brief matters before we get into the reasons for decision.

The first would be that I'm going to request that the Registrar's Case Brief which was kindly provided on

April 26th might become our Exhibit No. 7 for tracking purposes; all 100 -- or, pardon me, 247 pages. These cases were of considerable assistance.

I expect during the course of the reasons for decision that all parties will be muted. I will be providing oral reasons for decision. I understand that are proceedings are being recorded by Ms. Alison Minors, court reporter. We may perhaps take a time out at some stage in the reasons for decision. And, if anybody needs desperately a time-out for reasons which are not required to be disclosed, please flag Mr. Wiskin or wave.

I'm also going to say that the persons who are participating in this proceeding this afternoon and perhaps into the evening are not required, if they do not wish, to remain on video. The screen can go black at their option but -- and no offence will be taken.

MS. FRIEDMAN: Thank you, Mr. Chair. Good afternoon, Mr. Chair and Panel Members and everybody participating. The only comment I have is, if the decision is to grant the appeal as to penalty in part, we would be seeking brief cost submissions.

MEMBER WILLIAMS: Thank you. Anything further?

MS. FRIEDMAN: No, thank you.

MEMBER WILLIAMS: Thank you. Ms. Pace.

MS. PACE: Nothing from the Registrar. Thank you, Mr. Chair.

MEMBER WILLIAMS: Excellent. Thank you.

Reasons for Decision:

The case of the positive test for Cobalt. The appeal as to penalty.

Overview:

This appeal was heard on March 29, 30, 31 and April 22nd and parts of two evenings via electronic format. Submissions on behalf of both parties were made on April 26th. Seven exhibits have been filed; the HRAP Amended Appeal Book; the Appellant's Hearing Brief; the Appellant's Book of Documents; the Registrar's Hearing Brief; the Registrar's Exhibit Brief, Book 1; the Registrar's Exhibit Brief, Book 2; the Registrar's Case Brief-Submissions.

The 1,728 pages of material were supplemented by two audio tapes of witness interviews. The representative for the Registrar, The Alcohol and Gaming Commission, called four witnesses: Troy Moffatt, Evan McInnis, Tyler Durand and Lydia Brooks. Counsel for Rodney V. Boyd, the Appellant, called three witnesses: Clara Fenger, Michelle Bowman and Christoph

Grossenbacher. The matter was adjourned to April 29 for a decision.

The Race:

On Saturday, October 17, 2020, the Super Finals for the Ontario Sires Stakes were held at Woodbine Mohawk Park at Campbellville, Ontario. Rose Run Victoria participated in the second race, the Gold Super Final, for three-year-old filly pacers. The ten-horse field competed for a purse of $250,000. Rose Run Victoria was one of four pre-race favourites. Rodney Boyd was the trainer of record.

The Sample:

Test inspector, Kari Johnson, collected an official sample of urine from the horse after the race at 8:08 p.m. in the presence of groom, Katie MacNeil. The sample was taken pursuant to Rule 9.03 of the Rules of Standardbred Racing 2018. The purpose, the detection of any prohibited substances or medications in the horse under the Pari-Mutuel Betting Supervision Regulations pursuant to the Criminal Code of Canada.

The Certificate:

The official sample of urine was received by Michael Ryan of Ottawa on October 20 at the Reference and Research Laboratory for the Canadian Pari-Mutuel Agency known as the CPMA. The sample was contained in a plastic container duly sealed and

identified in a sealed bag. The box, bag and official sample were examined and found to be intact, secure, undamaged and free of fractures and punctures. Sample was analyzed between October 27 and 30. Sample contained drug within the meaning of the Pari-Mutuel Betting Supervision Regulations to wit and I quote, "Cobalt quantified at 117 nanograms per millilitre." The Certificate of Positive Analysis of an official sample was signed in Ottawa, Ontario on the 30th day of October by both Michael Ryan, official chemist, and Lydia Brooks, official chemist.

The Breach of Probation:

On December 4, 2019, Boyd received a three-part penalty from the Alcohol and Gaming Commission of Ontario for a TCO2 positive test violation for Standardbred racehorse Dragon Lady Art from the second race at Grand River Raceway. The three sanctions were as follows: suspension 60 days from December 1, 2019 to January 19, 2020; a monetary penalty of $3,000; and probation for two years from January 20, 2021 to January 19, 2022 inclusive. Boyd was on probation for the TCO2 positive on October 17, 2020, the date of the race, that resulted in a Class 3 positive for Cobalt. Boyd was approximately nine months into the 24-month probation order on the date of the race.

The Notifications:

The CPMA advised the Alcohol and Gaming Commission for Ontario, known as the AGCO and the Commission, of the positive

test. The Commission is required pursuant to Rule 9.07 to notify the trainer, "as expeditiously as possible." Troy Moffatt, a compliance official with AGCO, notified Boyd in person at the Shamrock Training Centre later that day. David Stewart, racing official and Standardbred judge, confirmed the notification by telephone with Boyd in the presence of Moffatt. Rule 9.07.01 provides in part,

> "Once the Commission has notified the trainer, the Judges or Administration may ..." and subparagraph (2) inform the trainer that he has been suspended and that none of the horses in his custody shall be allowed to start until the matter is considered and disposed of or until the horses have been turned over to another trainer approved by the Judges."

Rose Run Victoria was placed on the Judges' List and rendered ineligible to race for 15 days from October 30 to November 13, inclusive.

The October 30 Ruling.

Boyd was indefinitely suspended. The ruling reads as follows:

> "Take notice that trainer Rod Boyd is hereby indefinitely suspended as a result of the breach of probation."

It goes further to state,

"The urine sample obtained from Rose Run Victoria following the race resulted in a Certificate of Positive Analysis for the drug Cobalt."

The Stay:

Boyd remained under the indefinite suspension from October 30, 2020 until November 17, when a limited stay was granted by the HRAP following a contested hearing. Boyd served parts of 19 days of pre-appeal hearing suspension.

The December 18 Ruling:

On December 18, 2020, following an investigation by the Alcohol and Gaming Commission, the Deputy Registrar imposed ten sanctions upon Boyd. The sanctions included:

(1) suspension for 180 days December 21, 2020 to June 18, 2021 inclusive.

(2) a monetary penalty of $5,000; and

(10) two years' probation was ordered commenced June 19, 2021 to June 18, 2023, inclusive.

On February 22, 2021, the limited stay of suspension was rescinded by the HRAP upon the request of the Appellant and with the consent of the Respondent. Boyd served a further 67 days of pre-hearing suspension. The total pre-hearing suspension served is now 86 days, just under three months.

Powers of the Panel:

The Horse Racing Appeal Panel is a creature of statute pursuant to the Horse Racing Licence Act, 2015. How did Boyd get here? Rule 8.1 states, "A person who considers himself aggrieved by a decision may appeal the decision to the Panel. Rule 8.2 sets out the powers of the Panel. On hearing the appeal, the Panel may confirm or vary the decision being appealed or set it aside.

The Complaints of Unfairness - The Case for the Appellant:

Counsel for Boyd prepared a well-crafted, 13-page document entitled "Brief Summary of the Relevant Facts and Basis for Appeal." Issues of concern included decisions made during the course of proceedings by multiple representatives of the Alcohol and Gaming Commission as follows:

(1) the immediate indefinite suspension of Boyd before investigation, before disclosure, before residue testing, before presentation of evidence, before the opportunity to participate in a proceeding with the potential for severe penalties;

(2) the refusal to consent to a stay of suspension, the necessity of a hearing in which the opposition to a stay continued; and

(3) the refusal to participate or "even entertain the

possibility of a settlement" agreement combined with three pre-hearing conferences held January 27, February 22 and March 4.

These issues of concern which include claims of procedural unfairness will be addressed after the reading of brief excerpts from a classic book and a review of five essential rules of racing.

The classic book is Alice In Wonderland, Chapter 11, entitled Who Stole the Tarts and it reads as follows:

> "'Herald, read the accusation", said the King. On this, the White Rabbit blew three blasts on the trumpet and then unrolled the parchment scroll and read as follows:
>
> 'The Queen of Hearts, she made some tarts,
>
> All on a summer day;
>
> The Knave of Hearts, he stole those tarts,
>
> And took them quite away!'
>
> 'Consider your verdict,' the King said to the jury. 'Not yet, not yet!', the Rabbit hastily interrupted. 'There's a great deal to come before that!'
>
> 'Give your evidence', said the King. 'And don't be nervous or I'll have you executed on the spot. Let the jury consider their verdict', the King said for about the twentieth time that day. 'No, no', said the Queen, 'Sentence first, verdict afterwards.' 'Stuff and

> nonsense', said Alice loudly, 'The idea of having the sentence first.' 'Hold your tongue', said the Queen, turning purple. 'I won't', said Alice. 'Off with her head', the Queen shouted at the top of her voice."

This is from Alice's Adventures in Wonderland and Through the Looking Glass from a book published in Penguin Books in 1965 edited by Martin Gardner, 1960.

So Boyd received an immediate and severe sanction for the allegation of a positive test. However, unlike the Knave of Hearts, Boyd agreed to abide by the rules in a highly-regulated industry.

Agreement to Abide by Rules:

Rule 3.03.01 of the Rules of Standardbred Racing 2018, at page 17 of the 292-page booklet, states in part as follows:

> "Every person licensed by the Commission is deemed to have agreed to abide the conditions set out in the application for the licence, the licence itself, the Act, the Rules and regulations thereunder."

Now, what are the four other essential rules of racing which Boyd faced? One, the trainer responsibility rule, Rule 26.02.01 which states in part,

> "A trainer shall be responsible at all times for the condition of all horses trained by him."

Number two, positive test violation, Rule 26.02.02.

> "Any trainer who fails to protect or cause any horse trained by him to be protected and a positive test thereby results violates the Rules."

Number three, absolute liability violation, Rule 26.02.03.

> "The Commission and all delegated officials shall consider the following to be absolute liability violations,
>
> > (c) any trainer whose horse tests positive resulting from testing in accordance with or under the Pari-Mutuel Betting Supervision Regulations;

Number four, Rule 9.02.01,

> "A Certificate of Positive Analysis of an official sample completed in accordance with section 165 of the Pari-Mutuel Betting Supervision Regulations is proof of the statements contained in the certificate. Without proof of the signature or of the official character of the person or persons appearing to have signed the certificate."

These Rules, the cumulative impact of these Rules, present Boyd with a formidable case to meet. The impact of the Rules, in combination with the evidence that Boyd had suffered a TCO2 positive violation in December of 2019 and that, pursuant to a settlement agreement, was just nine months less three days into

a 24-month period of probation provided an ample foundation to the AGCO to refuse the request made by counsel.

The decisions made by the representatives of the AGCO were well within a reasonable range of alternatives in the prosecution of this matter. And, in view of the evidence available, no unfairness is found.

The Claim that the Overage was Trifling:

There are at least five substances that are subject to quantitative analysis versus qualitative analysis alone. The threshold for Cobalt has been 100 nanograms per millilitre in urine since May 1, 2017, almost four years ago. The threshold was established after considerable research and collaboration with other countries. The threshold level is consistent with many other international jurisdictions.

There is considerable controversy in both the veterinary community and the scientific community as to whether, (1) the preferred matrix is blood; (2) the threshold is too low; (3) that the health of the horse is not endangered; and (4) that there is no performance enhancement. These are troubling issues.

However, this Panel, as indicated earlier, is a creature of statute. Our powers are set out in the Horse Racing

Licence Act. The overage is actually 18 nanograms per millilitre. The accuracy/reliability of the multiple testing performed in late October of 2020 resulted in a level of confidence by CPMA out of 99.7 per cent as per the evidence of Lydia Brooks. The measurement of uncertainty as presented by witness, Clara K. Fenger, doctor, does not put the positive test into realistic doubt.

Other legislation contains thresholds. The Criminal Code of Canada, Section 320.14(1)(b), what is popularly known as the over 80 offence, states as follows:

> "Everyone commits an offence who has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration that is equal to or exceeds 80 milligrams of alcohol in 100 millilitres of blood."

This legislation has been in effect under different section numbers since about 1969, approximately 50 years. A spectrum of severe penalties are provided for this section as well, also a quantitative breach and also 80 milligrams of alcohol. Actually, equal to or exceeds 80 milligrams of alcohol.

The materials submitted by counsel for the Appellant including -- included Exhibit No. 2, the Appellant's Hearing Brief. There's a delightful case of Her Majesty the Queen and Overold O-V-E-R-O-L-D set out in the index as rank 15, case 18, a decision of Magistrate's Court of Northwest Territories. De

minimis non curat lex is canvassed. This case involved a bubble pipe. The trace quantity in the bubble pipe of a forbidden drug was only discoverable by scientific means. And the court stated in part and I quote,

> "The maximum de minimis non curat lex (translated, the law does not concern itself with trifles) has an ancient and colourful history in our jurisprudence being honoured as much in its breach, it seems, as in its observance. Our general literature provides illustrative examples."
>
> There's a quotation of a case and it states further,
>
> "Where some 440 years ago, the tale was probably already ancient in the telling."

And I pause to say this marvellous excerpt follows,

> "A cook who sought compensation from one who had consumed some traces of smoke and vapour from the cook's roasting goose was held entitled to compensation in kind; for example, by having heard the jingling of the customer's coin which was surely quite compensation enough."

Now, I'm not seeking to diminish the sincerity in relation to which this application has been brought but that marvelous quotation could not escape reference.

The decision that has been provided in the Registrar's

Case Brief, Exhibit 7, tab 11 at paragraph 77, the decision of Peel (Region, Department of Public Health) against Le Royal Resto and Lounge Inc. from 2017, the Ontario Court of Justice states that the Defendant, in this case the Appellant, who raised the defence has the onus of proving the defence on a balance of probabilities. And the Panel has come to the conclusion that this defence has not been made out on a balance of probabilities.

Cobalt, The History:

The first cautionary approach to Cobalt was a notification to the horse racing industry from the CPMA on February 16, 2015, six years ago now, Subject: Cobalt. The quotations are as follows:

> "Cobalt is a naturally-occurring trace element present in all horses at very low levels. It can also be found in several feed stuffs and supplements such as Vitamin B12. Horse racing regulators around the world are investigating allegations that large amounts of Cobalt have been administered to racehorses in the belief that they will enhance performance by inducing the production of red blood cells."

On the same day, Standardbred Canada repeated this cautionary instruction and advised that the CPMA would begin testing for elevated levels of Cobalt in official samples at

Canadian racetracks. The standard protective statement is made and I quote,

> "As with all medications and supplements, owners and trainers should discuss the use of Cobalt supplements with their veterinarian."

These cautionary instructions were repeated over a period of years by both CMPA and Standardbred Canada in multiple further notices to the industry. On June 3, 2015, the Ontario Racing Commission, the ORC as it then was, issued a notice to the industry to advise that Ontario will begin testing for Cobalt with a threshold of 50 nanograms per millilitre in blood as of August 1, 2015.

“The ORC believes that Cobalt testing is not only a matter related to the integrity of horse racing but, more importantly, an animal welfare issue. When administered in appropriate quantities, there is likely very little performance benefit to Cobalt. And, when used in excess, this element can be toxic to horses.

Some commercially-available equine products containing Cobalt revealed that the use of the products in the doses and routes described did not produce Cobalt levels above the proposed ORC threshold.” The product list included Vitamaster and Vitamin B12 and further particulars in relation to both as well as others. The ORC issued a General Directive No. 2/2015 that,

> "As of August 1, 2015, where Cobalt is detected at a level of 50 nanograms per millilitre or more in blood will be deemed to be a violation of the Rules of Racing 2017."

On May 1, 2017, almost four years ago now, Cobalt testing in Canada was moved from provincial oversight to the CPMA under its official Equine Drug Control Program. On April 6, 2017, the CPMA advised in a memorandum to the Canadian Horse Racing Industry,

> "The CPMA added Cobalt to the list of quantitatively-prohibited substances in February 2017. After much research and collaboration with international regulators, it was determined that the thresholds for Cobalt would be 25 nanograms per millilitre in blood and 100 nanograms per millilitre in urine. These levels are consistent with thresholds used in many other international jurisdictions.
>
> The CPMA's research indicates that vitamin supplements, when used alone and according to the label directions, should not increase Cobalt levels enough to cause a positive test. In addition, our research indicates that, when horses were allowed free access to Cobalt-containing salt block, there was little to no effect on the horses' Cobalt levels. Cobalt levels may build up over time when given repeatedly and its elimination from the horse can take an extended period of time.

It is always good practice to take care and read the list of ingredients when choosing products that are administered to horses. As with all medications and supplements, owners and trainers should discuss the use of Cobalt supplements with their veterinarian."

On the same date, Standardbred Canada provided the same additional information on the Cobalt thresholds.

On May 9, 2018, almost two-and-a-half years before the positive test for Rose Run Victoria, the CPMA published an update on Cobalt and the quotation is as follows:

"In the past 12 months, the CPMA has issued seven certificates of positive analysis for Cobalt; all were in urine. Cobalt concentrations for positive tests range from 116 nanograms per millilitre to 340 nanograms per millilitre. For reference, the regulatory thresholds are 100 nanograms per millilitre in urine and 25 nanograms per millilitre in blood.

In order to avoid a positive test, the International Federation of Horse Racing Authorities recommends that no more than one milligram per injected dose or no more than five milligrams per oral dose be given to a horse. The CPMA agrees with this advice and also recommends that all Cobalt supplements containing Cobalt be withheld for the 48 hours preceding a race". As always, and the ubiquitous

phrase appears again, "the CPMA strongly recommends that your veterinarian be consulted on any decision to administer any supplemental product to a horse."

Now, the fifth and final declaration from CPMA has occurred on March 23, 2021, well past the time of the positive test or Mr. Boyd. This is a further memorandum to provincial regulatory bodies, to the Canadian horse racing industry and to horsepersons' groups, the subject recommendations for reducing the risk of a positive test in racehorses. The Canadian Pari-Mutuel Agency provides the following recommendations to assist horsepersons and minimize the risk of a positive test in their racehorses. Six cautionary instructions follow. The topic is diverse, the target is singular. Minimize the risk of a positive test.

Cobalt salts and Vitamin B12 have three bullet points and I quote,

> "Discontinue all supplements within 48 hours of the race. This will reduce but not eliminate the risk of a positive test."

And I pause to say this is a duplication of warnings in the past prior to the Rose Run Victoria positive test.

> "Keep in mind that longer withdrawal times may be required for horses that have received repeated doses of Cobalt-containing supplements and Vitamin B12 because Cobalt

levels can build up resulting in elevated levels for prolonged periods of time."

Slightly different wording, same message from well prior to Mr. Boyd's Rose Run Victoria obtaining a positive test.

"Cease any use of multiple supplements containing Cobalt or Vitamin B12."

There's the traditional recommendation about consulting veterinarian. There is a recommendation to subscribe to receive Canadian Pari-Mutuel Agency email notifications and an email subscription service address. And, if there are any questions, there are -- other contact information is provided.

Presence only versus quantification.

Cobalt is one of at least five substances tested, not for mere presence in a racehorse, qualitative testing, but for the amount, quantitative testing.

A threshold is established for each of the five; three are in the Elimination Guidelines booklet from CPMA now converted to online only; one is in the Rules of Standardbred Racing; and the fifth is Cobalt.

The CPMA published a revised edition of the Elimination Guidelines for the assistance of the horse racing industry on April 3, 2020. Cautionary instructions were included. Ninety-six of 99 listed drugs had screening limits for

qualitative presence only. The mere presence of the drug following a race is a violation. Only three of the 99 were screening -- had screening limits for quantitative presence; Furosemide also known as Lasix; Procaine also known as Novocaine; and Acetylsalicylic Acid also known as Aspirin. The fourth substance not listed in the booklet tested for quantitative presence is Cobalt. TCO2 is in a quantitative category and is unique in that it has its own battery of dedicated rules in the Rules of Standardbred Racing 2018.

The Witnesses:

For the Appellant:

Michelle Bowman, veterinary assistant, has been an assistant for approximately ten years. She is usually in Mr. Boyd's barn on a daily basis. Her question: "Why the overage from Mr. Boyd?" She provided evidence and I quote,

> "MSU had ability to differentiate organic Cobalt from inorganic Cobalt. UC Davis would ship promptly when approval granted."

Christoph Grossenbacher, Doctor of Veterinary Medicine for approximately 15 years, has known Boyd for seven to eight years. Often sees him multiple times a day. Describes Boyd as one of the exemplary trainers in the industry. Grossenbacher was the treating veterinarian for Rose Run Victoria. He found the reading of 117 nanograms per millilitre of Cobalt in urine

“unimaginable”. He presented a number of opinions not shared by all including,

> "Everyone in the industry knows Cobalt does not work in the sense of providing an advantage. There are no negative side effects. CPMA is punishing for the presence of a vitamin, not for inorganic Cobalt."

He describes trying to locate a lab that would do the differentiation testing. He said that, "Rod ..." referring to Mr. Boyd, "... always adhered to his recommendations." He provided information from Alison Mueller who has provided a (indiscernible 40:56) in the materials in relation to her opinion that the Cobalt threshold is flawed. He felt Boyd had demonstrated all the possible cautions.

When cross-examined, there was a marvellous exchange when Ms. Pace, on behalf of the Respondent, asked the quite proper question, "The horse can verbalize?" The answer was not forthcoming. A follow-up question was put, "Can't you tell how it's feeling?" Answer: "Not unless it's Mr. Ed."

He said that a happy horse will perform better and that vitamins are necessary for life and that he secured a blood sample from Rose Run Victoria and also samples from other horses, but he found it was pointless. The sample had to be taken within two hours after the positive test. He was aware of one notice about Cobalt; one or two. He knew that it should be withheld for

up to 48 hours preceding a race. He appeared to be aware that Boyd was using a single Cobalt supplement, not the multiple Cobalt supplements that were provided to Moffatt and Fenger by Boyd.

Dr. Clara K. Fenger. Following the (indiscernible 42:55), she was qualified to testify in the capacity of an expert and to give opinion evidence on eight precise topics. I will not track through all eight, some are quite complex, but, in essence, they relate to equine health, nutrition and pharmacology.

She provided a conclusion which is set out in the Appellant's Book of Documents, Exhibit 3, tab 18, paragraph 67 to 70, page 11 of 11. She made five points. These points, when considered individually or in combination, do not provide a defence to Mr. Boyd but may constitute mitigating circumstances on penalty. She stated, amongst other things, that the detected amount of Cobalt consisted of predominantly organic Cobalt with the lesser contribution of inorganic Cobalt. That statement is vulnerable in view of the paucity of evidence in support.

She stated,

> "Cobalt at the level detected in the CPMA test, 117 nanograms per millilitre, was not performance enhancing."

She may be right but, in relation to this matter, that is irrelevant in relation to whether the offence has been committed

or not. Again, it may impact penalty.

She describes this horse care represents responsible treatment for a racehorse. There is no risk to toxic administration of Cobalt. She may be correct. And finally,

> "It is highly likely that Rose Run Victoria had blood levels below the serum plasma level that is supported by Brooks."

And it would appear that this particular statement does not operate to assist Mr. Boyd in this matter.

In cross-examination, she made reference, when asked by Ms. Pace, to, "the dark corners of your Web site" referring to CPMA. She stated, amongst other things, that,

> "Only the CPMA warning is relevant and that CPMA should go to extraordinary lengths to make such warnings clear to its horsemen when the warnings are in reference to necessary and required nutrition for horses."

From the perspective of the Panel, that would appear to be, without attempting to slag any organization, a wise prophylactic recommendation for all. She stated, amongst other things, that the regulatory level was too low, that blood was better than urine matrix and she described, and I thank her for this, matrix means that which seeks to enclose it.

She described that, in this case, it was her opinion

that the horse was penalized for appropriate care and that one should differentiate between organic and inorganic Cobalt.

We have heard from Ms. Lydia Brooks, also qualified as an expert witness, that Ontario and Canada test for total Cobalt, that there would be a logistical nightmare in an attempt to differentiate. It was put to her that the entire world tests for total Cobalt.

Witnesses for the Registrar:

Troy Moffatt, Compliance Official, Equine Drug Unit, 21 years' experience, has been involved in the Standardbred industry for four decades and has known Boyd for 20 years. On October 30th, he described Boyd as visibly upset and stating and I quote, "My life's been ripped upside down." Moffatt described Boyd as "professional with me, very cooperative as he always is and very diligent." On November 13, Moffatt took a 12-minute-and-46-second audio interview from Boyd. His opinion, Boyd did not deliberately administer Cobalt in the sense of seeking unfair advantage. Boyd had told him that, since the TCO2 which occurred in 2007, "I hadn't had anything in 14 years until this more recent occurrence." He was asked, "Did you intentionally administer Cobalt to the horse?" Answer, "No way."

Evan McInnis, Compliance Official, eight years' experience. He was assigned the task on March 8, 2021 to interview the hay purveyor, a gentleman by the name of Will

Yzerman who had been providing hay to Boyd for 19 years. Yzerman was not aware of any other positive tests for horses who had consumed his hay. And Yzerman took the position that his hay could not test positive for Cobalt.

Tyler Durand, Acting Manager of the Equine Drug Unit, Alcohol and Gaming Commission, since 2016, describes both parents race Standardbred racehorses; "I grew up in the industry." He gave us background information in relation to a working group regarding drugs in the industry and the concerns about the dangers to equine athletes and the unfairness of utilization of performance-enhancing drugs in races. Through him, we were introduced to a number of the notices which have already been referred to. He described trainers as operating a business in a regulated industry and he came to the -- he is of the opinion and I quote, "significant aggravating factor that he (Mr. Boyd) is on probation."

Lydia Brooks. She as well is qualified as an expert witness and provided opinion evidence on three topics: analytical chemistry in a forensic environment; analytical chemistry in testing for Cobalt; and analytical testing for Vitamin B.

She spoke of the natural levels in a horse in plasma of .5 nanograms per litre and in urine of 1 to 2 nanograms per millilitre. She described 12 horses at the CPMA research farm

close to Toronto, she said, actually having had the pleasure of a visit there many years ago in Jerseyville. She provided Registrar's Exhibit Brief, Book 1, Exhibit 5, tab 5 in her 14-page expert report a chart that has been very helpful which tracks through the product contents, amount given and calculated Cobalt amount for a Vitamaster, Vitamin B12, electro paste and an Omneity vitamin. I'm not going to read that material, I expect to the relief of all, into the record.

She provided seven statements in the conclusion of her expert report. They include, number one, there is no regulatory requirement in Canada to differentiate between Cobalt from inorganic sources and Cobalt -- pardon me, from organic sources and Cobalt from inorganic sources. I pause to state, she is correct.

Number two. Also there is no regulation that classes Cobalt from organic sources as legal and Cobalt from inorganic sources as illegal. I pause to say, correct.

Number three. The regulations make reference to the presence of a prohibited drug in a post-race sample regardless of its effect on performance. I pause to say, correct.

Number four. They set the rules to control the use and/or abuse of substances on race day as a measure to protect the betting public. Enforcing the regulations protects the integrity of the racing industry and maintains the perception of

a clean sport. I pause to say, correct.

Number five. The threshold already accounts for the common veterinary practice related to the administration of Cobalt supplements in Vitamin B12. I pause to say, correct.

Number six. It is impossible to say or to assert with any reasonable degree of scientific certainty that 117 nanograms per millilitre of Cobalt in the urine sample of Rose Run Victoria was not performance enhancing. It has been said that every fact has two faces. The polar opposite to her statement is also impossible to say.

Number seven. It is impossible to assert with any reasonable degree of scientific certainty that the detected amount of Cobalt (117 nanograms per millilitre) in the urine sample of Rose Run Victoria consisted predominantly of organic Cobalt with the lesser contribution of inorganic Cobalt. The sample was not tested to determine this. I pause to say, correct. I also must say that, and I want to address this later, that the sample was not tested to determine this. She is correct in that statement but it was not for want of trying.

She stated that the amount in the urine sample of Rose Run Victoria exceeded the Cobalt threshold. She is correct. The amount of Cobalt in the urine sample is inconsistent with the cited administration studies involving Cobalt supplements given at therapeutic levels. The level indicates a possible

administration of Cobalt sources within 24 hours of the race. And it certainly -- I pause to say, it is consistent with a possible administration.

She also states subsequent testing of another urine sample of Rose Run Victoria collected 13 days after the October 17, 2020 race provided the evidence that it's natural urinary Cobalt levels under the same feeding regime were between 6.33 nanograms per millilitre and 9.83 nanograms per millilitre which are well below the urinary threshold. She is correct.

Regardless of the source of Cobalt and whether Cobalt came from any other source as performance enhancing or not, Cobalt is prohibited under the regulations and controlled by means of an international threshold. She is correct.

And finally, enforcing the regulations protects the integrity of the racing industry and means the perception of a clean sport. She is correct.

The evidence in support of the performance-enhancing aspect which is not a necessary ingredient to complete a violation that is being presented in this hearing is not overwhelming. The -- controlling the misuse of Cobalt in horses at Exhibit 5, tab 5, addresses drug test analysis from a 2014 article where it states,

> "It is an attractive blood doping agent for enhancing aerobic performance. Indeed, recent intelligence and

> investigation have confirmed that Cobalt was being used in equine sports."

On page 93,

> "While there has been no reported study confirming the effect of Cobalt on the performance of race horses... this is 2014 and I realize there are some other studies referred to in the materials filed which provide support for some performance enhancement."

The Unexplained:

There's a curious and unexplained occurrence which caught the attention of the Panel. We know that, on May 1, 2017, CPMA began testing for Cobalt. Testing is now in its fifth year. We realize, because of the plague, that the lab was closed between March 23 and September 5, 2020. Four per cent of samples are randomly tested for Cobalt. Both blood and urine samples are tested. Over the course of the parts of five years, it would appear that 405 blood samples were tested with the threshold of five (sic) nanograms per millilitre resulting in zero certificates of positive analysis. In the same time frame, 1,614 urine samples were tested resulting in multiple violations at the 100 nanogram per millilitre threshold.

Severe consequences, as we know, are triggered by each positive test. What is the explanation? From the outside looking in, the findings appear rather bizarre. A rhetorical

question would be asked, "Do the findings suggest that a reassessment of either the threshold or the matrix or both is appropriate?

Ships Passing in the Night-The Request for Further Testing:

On October 30, the positive test for Cobalt was reported; 117 nanograms per millilitre by CPMA. On December 8, UC Davis reported Cobalt at 125 nanograms per millilitre. Multiple requests were made by and on behalf of Boyd for further testing of the leftover residue in an attempt to determine the respective contributions of both organic and inorganic Cobalt to the total Cobalt positive test violation. These attempts spanned parts of four months. Counsel for the CPMA was correct when it was declared that,

(1) the official sample is the property of the Federal Crown;

(2) the CPMA provides a sample residue release program to owners and trainers who have been issued a Certificate of Positive Analysis and would like a referee analysis performed on the sample;

(3) the policy does not provide for further use of any remaining sample residue for additional testing nor for testing for reasons other than to validate the findings of the official laboratory;

(4) the regulations do not require that sample residue be released for independent analysis;

(5) the process contemplated by the policy is now complete;

(6) the CPMA is not a party to the proceeding between Boyd and the Registrar of the Alcohol and Gaming Commission.

All six statements are correct.

The Panel is acutely aware that a Certificate of Positive Analysis for Cobalt quantified at 100 nanograms per millilitre or more in urine constitutes a violation irrespective of whether the Cobalt is from organic or inorganic sources. The Panel is also aware that there is a concern of CPMA, a legitimate concern, as to when will these requests stop. When does today's courtesy becomes tomorrow's obligation? There is a residue release policy. Is there a residual discretion and should there be? And it would appear that a notice, a revised CPMA policy dated April 26, 2021 P006, answers that question in the negative.

The Particulars of the Request by Boyd:

There was leftover residue after the UC Davis referee analysis. It was in good condition. McMaster Powell Equine Services received approval for the expansion of the import permit from the United States District -- Department of Agriculture, Animal and Plant Health Inspection Service, known as APHIS, upon

one condition. CPMA must agree to the transmission. UC Davis was prepared to send, MSU was prepared to receive. Supplemental testing was sought in an attempt to distinguish Cobalt from B12.

There was no challenge to the analysis by CPMA. There was no challenge to the analysis by UC Davis. The request was timely. The request was for a legitimate purpose. The requested testing had potential relevance to Boyd on the penalty phase of a positive test violation. There was no financial cost entailed for CPMA, no handling involved, no expenditure of human resources, no reputational harm, no health or safety issue. The response, it was not, "contemplated by the residue release policy. Our responsibility is complete." However, a consent to the transmission from California to Michigan in exceptional circumstances was not permitted -- not prohibited.

The consequences to Boyd of the Certificate of Positive Analysis for Cobalt were catastrophic. He had 27 horses; a day later, he had zero. He had eight employees; within days, he had zero. He had no income. The policy statement begins, this is the residue release policy, and I quote seven words, "In the interests of transparency and fairness." Those words would appear to have a meaning that is restricted. What Boyd sought was two words from the CPMA, "We consent."

This material was prepared before I saw the new revised edition about half-hour before the ruling. Two

rhetorical questions are there. Should the policy be revisited? Apparently, it has been. Should discretion be exercised if exceptional circumstances exist? It would appear that the answer is likely no.

It is incongruous to read the conclusion of Ms. Lydia Brooks when she states in her conclusion and I quote,

> "It is impossible to assert with any reasonable degree of scientific certainty that the detected amount of Cobalt, 117 nanograms per millilitre in the urine sample of Rose Run Victoria, consisted predominantly of organic Cobalt with a lesser contribution of inorganic Cobalt."

And the words that follow in the next quoted sentence, "The sample was not tested to determine this."

Ms. Brooks asks a number of questions in her materials as to whether or not the frequent and disproportionate administration of Vitamin B12 and supplements containing Cobalt is responsible treatment for a horse. A well-founded question. It was her expert opinion that the amount of Cobalt in the urine sample is inconsistent with the cited administration studies involving Cobalt supplements given at therapeutic levels. And, again, this has been referred to earlier, the level indicates a possible administration of Cobalt sources within 24 hours of the race.

The Precedents:

The Rule. The trainer responsibility rule is the foundation upon which racing integrity rests. Shakes against ORC, 2012.

The Danger. Performance-enhancing drugs cast an executioner's shadow across horse and industry. Moffatt against the ORC, 2009.

The Absolute Liability Standard. The absolute liability rule, while harsh, is reasonably justified in the public interest to protect horse racing. Shakes against Ontario Racing Commission, 2013, decision of the Ontario Superior Court, Divisional Court.

Absolute Liability Standard and Due Diligence. The Commission took into account the negative impact of drug use on the racing industry, the difficulties of prevailing drug abuse through a strict liability regime and the need for prevention of such abuse. It also took into account the interests of the trainers by its consideration of due diligence at the penalty stage. For example, by limiting the penalty for those who established due diligence to a fine described as, "non-oppressive" in amount and no suspension. Shakes against the Ontario Racing Commission, 2013, Ontario Superior Court, Divisional Court.

Due Diligence. Did Rod Boyd establish due diligence?

But what is due diligence? Boyd must prove that he took reasonable care. Her Majesty the Queen against Sault Ste. Marie, 1978 Supreme Court of Canada.

The Burden of Proof. Boyd bears the burden of proof on this issue.

The Standard of Proof. The standard of proof is a "balance of probabilities". FH against McDougall, 2008 Supreme Court of Canada.

What is Reasonable? What is reasonable depends on the circumstances. Did that response (the response of Boyd) constitute "all reasonable care" with the emphasis on all? Moffatt re against Ontario Racing Commission, 2008.

Reasonable Person in Like Circumstances. I quote, "It must not be forgotten that the standard to be applied in assessing due diligence is that of a responsible person in like circumstances; not one of immediate perfection upon recognition of a problem." Liat L-I-A-T Podolosky P-O-D-O-L-O-S-K-Y (Ecojustice) against Cadillac Fairview Corp. et al., Ontario Court of Justice, 2013.

Caution in Assessment. "As said in Hill J., and Canadian Tire" in assessing the efficacy of a due diligence defence, the court must guard against the correcting but at times distorting influences of hindsight. In considering the defendant's efforts, the court does not look for perfection or

some super human effort on the defendant's part." Her Majesty the Queen against Safety Kleen -- Kleen is K-L-E-E-N -- Canada Ltd., 1997, Ontario Court of Appeal.

Due Diligence. Penalty: In order for a trainer to obtain this relief from the penalty guidelines, the trainer does not have to establish due diligence, "in accordance with the definition of the defence of due diligence that applies to strict liability offences." Ontario (Racing Commission) against Durham D-U-R-H-A-M, 2016, Ontario Superior Court, Divisional Court.

At paragraph 42 of the same case, what this means is that a panel is free to impose a penalty lower than the guideline in a variety of cases including, for example, where it finds that a trainer has established that he or she exercised diligence in order to avoid violating the rules. But the degree of his or her diligence fell just short of the level for a successful defence of due diligence.

Due Diligence in the 23 Words. The 23 words are lifted from the April 27 -- 21st, 2017 notice from CPMA. Again, two-and-a-half years before the encounter of Mr. Boyd with the Cobalt positive. I expect he will remember these words forever. Cobalt levels may build up over time when given repeatedly and its elimination from the horse can take an extended period of time.

On May 10, 2018, CPMA advised, "CPMA recommends that

all supplements containing Cobalt be withheld for the 48 hours preceding a race."

The Misty Evidence, the Trainer and his Veterinarian

The trainer appeared in hearsay fashion on paper. The veterinarian appeared live and in full colour. The trainer was described by his veterinarian as a "exemplary trainer."

Unfortunately, no patient file is produced for Rose Run Victoria. However, impressive efforts were made to assist in an attempt to have the residue sample tested for organic versus inorganic Cobalt.

No specific entries or times are available by paper trail for discussion between the veterinarian and the trainer about Cobalt. There were not, and this is not surprising in view of the number of horses and the number of visits, any specific recollections. It would appear that the veterinarian was perhaps not aware of the full spectrum of CPMA notices that he'd seen one or two. Counsel for the Appellant raised the issue that Boyd relied on his veterinarian "potentially to his detriment."

The veterinarian was aware of a single supplement of Cobalt being used by Boyd in relation to Rose Run Victoria. It would appear multiple supplements were used; three 48 hours out and one 24 hours out.

It is the opinion of the Panel following considerable

discussion that due diligence was not proved by Boyd on the balance of probabilities. In his own mind, what gets tagged with the label subjectively, he would appear to have felt that he was doing everything realistically possible to avoid a positive test. From the point of view of an outside reasonable observer, the objective observation, the answer would likely be no.

There is no evidence that he was aware of the various cautionary instructions in relation to Cobalt issued over a period of six years by CPMA nor is there evidence of full discussion between him and Dr. Grossenbacher in relation to the requirement for a longer wait time, the accumulation, repeated administration and the number of products and the timing of the products.

Cobalt, in summary, is a prohibited substance in a racehorse when over the threshold. These quantitative thresholds have been in effect for both blood and urine since May 2017 and thresholds, as we know, are not unique to horse racing. No proof of performance enhancement is required. I realize this was canvassed earlier. The authority is set out in Parente (re) 2016, Ontario Racing Commission and I quote,

> "Traces of prohibited substances which are at or above the screening level do not require further proof of a pharmacological impact upon the performance of a racehorse to constitute a positive test."

Cobalt is said to be capable of enhancing the performance of a racehorse. No evidence in this proceeding has been proffered that 117 nanograms per millilitre in urine did have such an impact. Cobalt has the potential to compromise the health of a racehorse. No evidence has been proffered in this proceeding that 117 nanograms per millilitre in urine did have such an impact. Cobalt, as indicated earlier, quantified at that level is not a trace overage. It does not constitute a trifling matter and the differentiation between the types of Cobalt is not a necessary step to secure a violation. Violation is complete on the total Cobalt being above the threshold.

Now, the evidence of the Equine Drug Program Working Group was provided in part through the evidence of one of the officials from the Alcohol and Gaming Commission. It was established in May of 2017 -- there's a quotation I'm seeking to provide.

> "Based on consultations with the Working Group, the Alcohol and Gaming Commission will revise the Equine Drug Program process which reflects its objectives of ensuring the integrity of horse racing and the protection of equine athletes. The AGCO's Equine Drug Program is an important pillar of the AGCO's regulatory model and equine drug violations are significant violations."

Penalty. As can be seen, the Panel has a broad

discretion in penalty and I quote, "The penalty guidelines provide (1) the suggested penalties, suspensions and fines are guidelines only; and (2) the Commission and/or its representatives may take into consideration any mitigating circumstances surrounding a positive test case and may impose a penalty lower than that suggested in the guidelines. Ontario (Racing Commission) against Durham, 2016, Ontario Supreme Court, Divisional Court.

And I quote further, paragraph 41,

> "Suspensions and fines may be short of the guideline in any amount that a panel reasonably considers appropriate in the particular circumstances."

Paragraph 42,

> "What this means is that a panel is free to impose a penalty lower than the guidelines in a variety of cases including, for example, where it finds that a trainer established that he or she exercised diligence in order to avoid violating the rule, but the degree of his or her diligence fell just short of the level required for a successful defence of due diligence."

And that was repeated earlier.

What are the mandatory sanctions? There are consequences from all positive test certificates. And, for this

particular unfortunate occurrence on October 17, Rose Run Victoria was declared ineligible to race. Rule 20.01.01(2)

Number two, the purse was redistributed. Rule 9.13.

Number three, the purse monies or trophy received by owner returned. Trainer/driver fees redistributed.
Rule 18.08.01.

Number four, horses owned in whole or in part by trainer suspended. Rule 6.13.1.

Number five, horses trained by trainer are permitted to be released to the care of another trainer approved by the judges. Rule 26.08. In addition, as we know, on October 30, 2020, Rose Run Victoria was scratched from the race card.

Now, if there is a positive test in Ontario, there is a requirement that the Uniform Classification Guidelines of Foreign Substances, as promulgated by the Association of Racing Commissioners International Inc. known as ARCI, be considered. Rule 9.08.02 states,

> "Upon a finding of a violation of the positive test rules, the judges shall consider the classification level of the violation."

Now, the Classification Guidelines from ARCI refer to approximately 1,100 drugs and substances. There are 57 pages of guidelines. If the pages were numbered, Cobalt would be at page

16 of 57. Each page contains six vertical columns. From left to right, they are as follows: Drug or Substance, Trade Name, Drug Class, Penalty Class, Special Notation and Note. Cobalt falls into Drug Class 3. According ARCI, it falls into Penalty Class B1. There is a special notation for Cobalt which reads as follows. And I realize that the approach of ARCI in relation to penalty on Cobalt does not determine what unfolds here in Ontario. We have our own rules.

> "For Cobalt concentrations of less than 25 parts per billion of blood serum or plasma, no penalty is recommended. For concentrations of 25 parts per billion or greater but less than 50 parts per billion of blood plasma or serum, the recommended penalty is a written warning. The placement of the horse on the veterinarian's list with removal from list only after a blood test confirms that the concentration is below 25 parts per billion of blood plasma or serum. Testing shall be paid by the owner of the horse. Concentrations of 50 parts per billion or greater in blood plasma or serum have a recommended B penalty.
>
> For a first offence, minimum suspension recommended can be undercut by 15 to 60 days; the fine, minimum recommended, 500 to 1,000.
>
> Second offence in the 365-day period, 30 to 180 days; fine 1,000 to 2,500.

Third offence, 60 days to one year, 25 to 5,000 dollar fine or five per cent of the purse or the greater of the two. And the individual may be referred to the Commission for any further action deemed necessary by the Commission."

Those guidelines from ARCI may have potential impact in future in relation to the approach taken in Canada. The guidelines for our jurisdiction are set out in Policy Directive No. 1-2008 under Penalties for Equine Drug TCO2 and Non-Therapeutic Drug Violations. "Application of the Guidelines will take into consideration the following:

(1) the suggested penalties (suspension and fines) are guidelines only.

(2) the Commission may exercise discretion in interpreting these guidelines and assessing penalties and may consider all previous violations involving drug or any other substance prohibited by rule.

Although all previous violations may be considered in determining the appropriate penalty, the penalties for second violations suggested in these guidelines are based on,

(a) the assumption that the previous violation was in the same class of drug;

(c) the date of conviction or ruling of the previous violation occurred within three years of the first

offence;

(3) the Commission may take into consideration any mitigating or aggravating circumstance surrounding a positive test case and may do any of the following:

(a) impose a penalty that is higher or lower than that suggested in these guidelines;

(b) require completion of an educational component in addition to or in lieu of a suggested guideline penalty;

(c) for second violations which occurred within three years of the first violation but in a different class of drug, the Commission will exercise discretion in assessing the penalty by considering the following:

(a) the number and class of the previous violation.

(b) the time frame between violations; and

(3) any mitigating circumstances.

(7) Regardless of the penalty imposed, the horse in question will be disqualified and there will be a loss of purse."

Policy Directive No. 1-2008 provides for a second violation which the positive test for Cobalt is in this matter of between six months and one year suspension and a $5,000 monetary

penalty.

Statement 3 of 10 of the Guidelines says,

> "The panel may ..." it's discretionary "... take into consideration any mitigating or aggravating circumstances.” The Panel, of course, has the power to not only impose a penalty that is less than the suggested in the Guidelines but may impose a penalty that is more."

What are the mitigating circumstances in this matter? Some of the circumstances I will track through are more potent than others.

The Admission against Interest.

Boyd admitted a Certificate of Positive Analysis for the drug of Cobalt. That admission necessarily includes continuity, testing, integrity of the process. It is the functional equivalent of a plea of guilty in other types of adversarial proceedings which has always been considered as a mitigating factor.

It is a Class 3 violation which is a mitigating factor perhaps of modest proportion. It is a less serious offence than the one that he is on probation for.

Time Already Served.

Eighty-six days under full suspension. Full

cooperation throughout the investigation and interviews. Excellent reputation as a trainer. Presented as a concerned, responsible trainer. Described as exemplary by his vet. In the opinion of an experienced investigator, he did not deliberately administer Cobalt, I will add the words, for nefarious purposes.

No Intention to Gain an Unfair Advantage:

He consulted with his veterinarian. There have been other consequences which inevitably befall a person who acquires a positive test for a horse they trained. Twenty-seven horses to zero and the eight employees to zero. The personal impact. We are advised of the impact in Exhibit 3-3, the April 21, 2021, 2:07 p.m. email from Mr. Boyd. In Exhibit 3, tab 16, the seven character letters. Particularly touching are the character letters of Katie MacNeil and Becky Boyd, the spouse of the Appellant. There has been an extreme ripple effect in the life of Mr. Boyd and his family. There has been a financial impact. There has been a reputational impact. Exhibit 3, tab 17 sets out five veterinarian letters including the evidence of Dr. Christoph Grossenbacher and provided his evidence late in the afternoon and early evening on Thursday, April 23rd.

Licensing History:

Exhibit 3, tab 1 in the Appellant's Book of Documents contains the licensing history for Mr. Boyd. It spans parts of 25 years. There are three entries of concern. The record begins

in 1996. The first adverse entry relevant to this proceeding is March 5, 2007, TCO2 positive, race 10, Woodbine for Kirby Lad, $1,500 fine, 60-day suspension from March 5 to May 3, 2007.

There follows a 12-year gap. And on or about December 1, 2019, a TCO2 positive, Race 2, Grand River, Dragon Lady Art, $3,000 fine, 60-day suspension, two years' probation as part of a settlement agreement. That probation runs from January 20, 2020 to January 19, 2022.

And then there's the occurrence we are seized with, October 17, 2020, Cobalt positive, race 10, Rose Run Victoria, Woodbine Mohawk Racetrack. April 29, 2021, the penalty awaits.

Aggravating Circumstances:

Policy Directive No. 1-10 contains ten statements including four for second violations which occurred within three years of the first violation. Mr. Boyd unfortunately is a second-offence candidate. He was nine months less three days into his 24-months' probation when he acquired the Cobalt Class 3 violation.

Now, the Horse Racing Licence Appeal Act under Section 8.2 empowers the Panel, as canvassed earlier in these Reasons for Decision, to do one of three things; to confirm the decision being appealed from, to vary the decision being appealed from or to set it aside. The Panel has decided to vary the decision

being appealed from; that decision of December 18, 2020.

The Panel orders a three-part penalty. The penalty is as follows,

1. A monetary penalty of $5,000. Two thousand dollars of the monetary penalty is subject to a stay pending the successful completion of a further two-year probation order. The stay of the $2,000 will be rescinded upon a conviction during the period of probation for a Class 1, 2, TCO2 or a Class 3 equine drug violation.

2. A full suspension of a licence for a period of six months. The suspension will be divided into three parts. Part 1: 86 days, time already served. Part 2: 34 days from April 30, 2021 to June 2, 2021 inclusive. Part 3: 60 days subject to a stay pending the successful completion of a two-year probation order. The stay of the 60 days will be rescinded upon a conviction during the period of probation for a Class 3 -- Class 1-2, TCO2 or a Class 3 equine drug violation.

3. A two-year probation order. The following terms are added to Boyd's licence: two years of probation commencing June 3, 2021 to June 2, 2023 inclusive. The conditions are as follows,

(1) the licensee shall keep the peace and be of good behaviour;

(2) the licensee shall allow Commission inspectors access to a stabling area at any time to conduct unannounced random searches for illegal or non-therapeutic medications or drugs;

(3) the licensee shall allow Commission inspectors to seize any illegal or non-therapeutic medications or drugs found at his stabling area;

(4) the licensee shall be subjected to the AGCO's Out Of Competition program;

(5) the licensee may be subject to a notice of proposed order in addition to any penalty imposed by the AGCO racing officials for any breach of the terms of the licence; and

(6) the licensee must complete the Equine Drug Use and Awareness program prior to reinstatement.

These provisions are pursuant to the Rules of Standardbred Racing, 2018, Rule 6.01(d) and Policy Directive No. 3-2008.

Although not part of the probation order, it is highly recommended by the Panel that Mr. Boyd acquire the full set of 43 memoranda issued by the CPMA between 2011 and 2021 in an attempt to avoid a reoccurrence of this nightmare. Ms. Lydia Brooks, in her evening session as a witness, kindly retrieved the memoranda from CPMA during the intermittent visits from the bunny rabbit.

Those are the Reasons for Decision. And thank you. The End.

MS. PACE: Thank you, Mr. Chair.

MEMBER WILLIAMS: You're most welcome. Thank you.

MS. FRIEDMAN: Thank you, Mr. Chair and thank you, Panel Members for the decision. I have a couple of questions.

MEMBER WILLIAMS: Yes.

MS. FRIEDMAN: As a matter of clarification, when does the suspension end? I missed day 34 from now.

MEMBER WILLIAMS: One moment, please. The 99 pages haven't yet spilled onto the floor, so it should still be available. The 34 days as part 2 of the suspension will be from April 30, 2021 to June 2, 2021 inclusive.

MS. FRIEDMAN: Okay. So, as of June 3rd, he is a free to be participating again.

MEMBER WILLIAMS: Yes, indeed.

MS. FRIEDMAN: Thank you.

MEMBER WILLIAMS: You're welcome.

MS. FRIEDMAN: And the second question, given that the Panel has elected to vary the penalty and given the efforts by Mr. Boyd to attempt to resolve without going to a hearing, will this Panel consider costs submissions?

MEMBER WILLIAMS: I would say, and I would perhaps wish to consult with my fellow Panel Members, that we will always consider whatever submissions either counsel wish to raise. I would expect that, in view of the matter as it has unfolded, that an application for costs based on the foundation that's been presently proffered -- and I realize it was in compact form -- just a sentence or two not -- would be -- your litigation skills would be tested.

MS. FRIEDMAN: The Panel is not prepared to order costs in the circumstances?

MEMBER WILLIAMS: Oh, I'm not saying that. I'm just saying that you may have -- we're prepared to hear your submissions as to costs.

MS. FRIEDMAN: Thank you

SUBMISSIONS RE COSTS BY MS. FRIEDMAN:

In short, the request for costs is based on Rule 2.1 of the HRAP's Rules of Procedure. And, in particular, 2.1(a) provides HRAP's Rules will be interpreted to promote the fair and efficient resolution of disputes. The reason I raise this is in relation to efficient resolution in a sense that the Appellant's efforts to attempt to resolve were rebuffed by the Registrar with the hope that we would be able to avoid essentially five days before this Panel.

This also is in accordance with 2.3 of the Rules of Procedure which states that the HRAP may exercise its powers on its own initiative or at the request of a party. And further, of course, in relation to Rule 7 which pertains specifically -- I'm sorry, Rule 17 which pertains specifically to costs. There is no suggestion that there was vexatious or bad faith conduct whatsoever on the part of the Registrar. The Appellant is simply making reference to unreasonable in the sense that this could have been resolved without going to a proceeding.

And, on that basis, there has been a significant amount of costs that have been incurred by my client; the four days, technically five days including today, of hearing; preparation days; three pre-hearings and one of those pre-hearings, Madam Vice-Chair Meyrick specifically said that that pre-hearing did not need to happen.

On that basis, we are respectfully requesting a partial order for costs.

MEMBER WILLIAMS: So the provisions you'd be seeking to rely upon would be the Rules of Procedure for Appeals, Horse Racing Appeal Panel at 2.1(b)?

MS. FRIEDMAN: I'm sorry, that's 2.1(a).

MEMBER WILLIAMS: (a), pardon me. Okay. Yes, yes?

MS. FRIEDMAN: Two-point-three.

MEMBER WILLIAMS: Yes, HRAP's powers.

MS. FRIEDMAN: As well as 17.1 and 17.5 which particularizes what the costs would be for different aspects of the proceeding, namely, preparation and/or attendance at a pre-hearing or pre-hearings or a hearing.

MEMBER WILLIAMS: Would you be kind enough -- it appears I am well-protected from the -- if it gets chilly next year, with the 1,728 pages of paper that surround me, but I seem to be missing in action, temporarily of course, of portions of the Horse Racing Appeal Panel Rules. And 17.1 and following seems to be absent at the moment. Could you perhaps, if it's not too onerous a task, read those sections in? MS. FRIEDMAN: Of course. And, again, I'll reiterate, I'm reading the rule in its entirety. I'm not suggesting vexatious or bad faith conduct whatsoever on the part of the Registrar.

> "17.1. Where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith, that party may make a request to the HRAP for costs which shall be made with notice to the other parties."

And, again, with respect to the notice, if there is a concern about notice, I'll refer back to 2.5 which says the HRAP may waive or vary any of these rules at any time. 17.5 states,

"The amount of costs shall not exceed 1,500 for each full day of preparation and/or attendance at a motion, pre-hearing or hearing."

And so I am referring to the five days of hearing, three preparation days and three pre-hearings.

MEMBER WILLIAMS: I might say at the outset that I am absolutely shocked that you could do the massive amount of preparation in just three days. I would be expecting it would be a multiple of three that were actually invested for both parties.

MS. FRIEDMAN: It was, in fairness, more than three but, for the sake of being reasonable in terms of this request, that's what I'm seeking.

MEMBER WILLIAMS: May I ask how many in total in reality?

MS. FRIEDMAN: I'd have to refer back to my materials but I'd say at least three times that amount.

MEMBER WILLIAMS: Yeah, that's -- I would be thinking even three times that amount would be modest.

MS. FRIEDMAN: Thank you.

MEMBER WILLIAMS: Any further submissions?

MS. FRIEDMAN: Subject to any questions you may have, those are my brief submissions on costs.

MEMBER WILLIAMS: Thank you. Ms. Pace, I expect you may possibly have a response?

MS. PACE: Oh, yes, Mr. Chair. Thank you. I'm just gathering my thoughts. I just need one moment.

MEMBER WILLIAMS: Since -- I don't want to disrupt you from your position, but I have indicated during the course of the hearing, or at least this is the way it is in my mind whether an option in reality or not, that both representatives have done a very professional presentation. I was particularly impressed with the presentation of the expert witnesses -- your respective expert witnesses and the care that was done in other aspects of the matter as well. But if Mr.(sic) Friedman did three times three-plus, what was yours?

MS. PACE: For preparation? I'm a perfectionist. You don't want to know. So much time. I spent -- many, many days and weekends and nights were put into that. I suppose I could quantify it but I'm not asking for costs.

MEMBER WILLIAMS: Go no further. I'm just -- I remain impressed. Having participated in different rules in the criminal justice system over the years, I've seen a wide variety of approaches in preparation or lack thereof.

SUBMISSIONS RE COSTS BY MS. PACE:

So to address the first part of my friend's submissions, or it might have been the last part of my friend's

submissions, with respect to the attending of the pre-hearing.

MEMBER WILLIAMS: Sorry, I'm just ---

MS. PACE: A few of those ---

MEMBER WILLIAMS: I'm just going to intrude for a moment.

MS. PACE: Of course.

MEMBER WILLIAMS: I take it you're prepared -- you may wish -- I'm hoping you don't, but you may wish an adjournment for the purpose of further preparation to address this particular issue. And I do have the power to force an audit, it appears, under 2.5 that I can waive or vary -- we can waive or vary any of these rules at any time. That's rather wide open. But I take it you're prepared to proceed without having a formal motion served on (inaudible 1:59:38) Affidavits.

MS. PACE: Yes. Thank you. Yeah, a motion that was not mentioned in advance.

BY MS. PACE:

So, as far as the pre-hearings go and awarding costs for pre-hearings, it should be noted that the Appellant requested two of those three pre-hearings. And those pre-hearings were put together to move this matter along and to allow Mr. Boyd some time to, obviously, put together his case and, you know, sort out what it was he wanted to do.

And the third pre-hearing was requested because the Appellant decided and elected to bring an expert less than 30 days before the hearing. So it was necessary to get an order to ensure that everybody had enough time to prepare for the hearing. So to suggest that costs ought to be awarded for pre-hearings, the Registrar is not going to ask for costs, but I would suggest that the Registrar be ordered costs for having to attend a pre-hearing for the late introduction of an expert witness.

My next submission would be that there is a test for costs and the rule is actually at Rule 13. I know that there are a couple of different versions out there. I think the rule is now -- it's written exactly the same but, for the reference in the record, I think it's Rule 13 now. And to be frank, costs do not follow an event when it comes to regulatory proceedings. In fact, this rule restricts when costs can be awarded and the Appellant would have to establish that the other party has acted unreasonably, vexatiously, in bad faith. Not settling because the Registrar ---

MEMBER WILLIAMS: You missed frivolous.

MS. PACE: Missed frivolous. Thank you. Yes.

BY MS. PACE:

So there's a test and it's restrictive and to suggest that awards be costs simply because the Registrar chose not to settle for any number of reasons which, of course, are

privileged, does not fall into any of those buckets. It is not unreasonable to maintain a position. And my friend has already said that the Registrar did not act frivolously, vexatiously or in bad faith.

And, if I could take Mr. Chair to Mr. Boyd's stay hearing ---

MEMBER WILLIAMS: Yes.

BY MS. PACE:

--- Mr. Sadinsky of this Panel suggested that, acting unreasonably, that there is a high bar. It's a high bar that has to be met in order to meet the test for acting unreasonably and that is found at the very last page of the decision with the citation being 2020 CanLII 94846 ONHRAP, yes.

And the awarding of costs is also, I would suggest to you, extreme when it comes to a regulatory body acting in the public interest. The Registrar had at least one witness that talked about us acting in the public interest. And the awarding of costs could cause the Registrar to change how they do things for fear of costs. It is perfectly proper for the Registrar to take a position contrary to the interests of the Appellants and put that question before the Panel and this happens in every case. This is not unusual.

And so I would suggest to you that awarding or putting

an award of costs against a public agency within its mandate to protect the public interests ought to be done only in exceptional circumstances. And this is actually codified by the Panel's own rules.

And so I would suggest to you that there was nothing that the Registrar did that was unreasonable. To suggest that keeping a position or taking a position that would be seen as adverse to the licensee, I would suggest, is not exceptional. This is an adversarial system. And so those are, from off the top of my head, what I can come up with on short notice. But this is not a loser-pay situation. This is administrative law. The Registrar was acting in the public interest and does not fall within any of the buckets of the test that is in the Rules. And the one bucket or the one prong of the test that has been articulated by my friend, the Chair of this Panel has already said it needs to be a high bar and I would suggest that the Appellant has not reached that high bar in suggesting what the Registrar did was unreasonable.

So, subject to any questions, those would be my short submissions.

MEMBER WILLIAMS: Thank you. Ms. Friedman, do you have any reply?

MS. FRIEDMAN: Yes, just very briefly.

REPLY BY MS. FRIEDMAN:

I think the focal point really here is the resolution efforts. And, from my perspective, and I know Ms. Pace may not share this opinion, that costs opportunities or costs are in place to discourage unreasonable movement toward a proceeding when there is potential for a resolution. And, from the Appellant's perspective, pre-dating the resolution efforts which were more efforts, it wasn't just a singular occasion, pre-dated pre-hearings and I think that's important to recognize in terms of when those efforts unfolded.

And, obviously, I'm not going to get into the details of what those settlement discussions were as that would be inappropriate. But I would suggest that certainly in the civil realm and I know that this Tribunal has indicated that the rules in respect to a civil realm apply here in an administrative proceeding that, in those cases, if a resolution effort was made and offers were made, then that is something to consider in terms of what the ultimate decision is. And, of course, if the ultimate decision was to uphold the actual penalty, there certainly wouldn't have been a request; it's simply because there was a request to vary and the Appellant sought to vary that by requesting a resolution in advance of the proceeding.

MS. PACE: Mr. Chair, if I may, I have case law to the exact opposite of that where this Panel has said that the Rules of Civil Procedure do not apply to the proceedings before this Panel. And that is in the Bahen decision if the Panel is

interested in reading that.

MEMBER WILLIAMS: I'm interested in knowing the guts of the decision.

MS. PACE: So Mr. Bahen was a jockey, I believe, and there was ---

MEMBER WILLIAMS: That's B ---

MS. PACE: It was in the process of -- pardon me?

MEMBER WILLIAMS: B-A-H-E-N, I believe?

MS. PACE: Yes. And ---

MEMBER WILLIAMS: I have a passing familiarity with it. Please continue.

REBUTTAL BY MS. PACE:

Thank you. So, you know, there's a little bit of background to the case. There's an eventual rule that is kind of changed around the circumstances of this case. It's not a positive test, however, a request for costs were made on behalf of the Appellant based on the Registrar acting unreasonably. And the decision in that case at the bottom of page 3, Mr. Chair again quotes at the outset,

> "We wish to make it clear that the Rules of Civil Procedure do not apply to the proceedings before this Panel nor does the principle that costs should follow the event. In our

view, the principles that apply to costs in judicial proceedings are different than those that should apply in an administrative proceeding such as before this Panel."

And there's a little -- I don't know if you want the rest of that paragraph. There is a little bit more to it but ---

MEMBER WILLIAMS: Yes, please.

BY MS. PACE:

So, on page 4 -- starting at the top of page 4, I'm just checking the page number, Mr. Chair goes on to say that,

"The loser-pay principle in particular should not apply as a matter of course. In our view, it would be undesirable to award costs as a matter of course particularly against licensees who may feel inhibited from pursuing their appeals if they believed that, if they were unsuccessful, they would be burdened with costs. The same principle applies to the regulator; the Registrar in this case who is charged with a duty to act in the public interest and may be inhibited from doing so because of the threat of costs."

And this decision is relied on by Mr. Sadinsky -- Chair Sadinsky in Mr. Boyd's initial costs decision in the stay. Mr. Chair Sadinsky says that he relies on the dicta contained in the particular section of Bahen. And the citation for Bahen is 2016 CanLII 76597 ONHARP.

MS. PACE: I'm sorry if I said that backwards. HRAP. My apologies.

MEMBER WILLIAMS: (inaudible 2:10:49) used the word harp. I thought you were seeking some divine guidance.

MS. PACE: Sometimes, yes. Thank you, Mr. Chair.

MEMBER WILLIAMS: Ms. Friedman, I'm going to be asking that we take a time-out so that members of the Panel can have a discussion on this particular issue. But, since we're about to depart on you for a little bit, do you have anything further in double surrebuttal?

MS. FRIEDMAN: Yes, thank you.

SUREBUTTAL BY MS. FRIEDMAN:

Without belabouring the point, Chair Sadinsky said -- I wouldn't suggest to you the opposite but he made reference in the Johnson case to "civil and criminal cases" being applicable to the administrative realm. And so I think, on that basis, it really -- whether it's on this issue or any other issue, it ought to be considered on a case-by-case basis in relation to the unique factual nature. And I think this certainly is a unique factual nature.

MEMBER WILLIAMS: Do you have per chance -- I know I have here amongst the 99 pages but I just can't find it -- the dates of the three pre-trials or pre-hearing conferences? The

PHCs?

MS. FRIEDMAN: Just a moment. One of them was February 22nd.

MEMBER WILLIAMS: I think they were January, February, March, but I just can't recall the precise ...

MS. FRIEDMAN: February 22nd I believe was the second one. March 4th was the third one. And bear with me. The first one ---

MS. PACE: Mr. Chair, it was January 27, 2021.

MEMBER WILLIAMS: Thank you very much. You know, maybe I can get the assistance of both of you. I perhaps coming from a different type of litigation see if there's an expression about loser in this case, to me the loser is the community which loses the skills of Rodney V. Boyd and the serious impact to reputation and family that necessarily flows from a positive test violation.

And I don't characterize this particular decision of the Panel as a win for somebody or a loss for the other. You folks may, and I'm not seeking to disrupt your (indiscernible 2:14:08) proceedings, but I just regard it as a well-argued case where there were triable issues and the Panel has come to a decision following a full hearing of the evidence and full submissions. But perhaps that's a naive approach by me.

MS. FRIEDMAN: Thank you. And I share your opinion certainly that -- and, again, the reason that this request is being made is this has been an extremely costly process, not just from a reputational standpoint, a financial standpoint and a personal standpoint. And that's the basis for the request that, if there was any possibility that it could have been avoided, my client would have been spared a lot of those costs. And apologies for the dogs barking in the background.

MEMBER WILLIAMS: Boy, thought it was somebody who had a sore throat. I'm not seeking to avoid making a decision on this particular matter. We will and very soon. But do you not -- are you of the -- I'm of the opinion -- you may dislodge this preliminary view, it's a preliminary view only -- that, on January 27, February 2nd and March 4th were prime time for -- the person who would be most aware of whether there was an unreasonable position advanced by one or both of the parties would be the Vice-Chair of the Horse Racing Appeal Panel, Sandra Meyrick, who I understood on each of the three hearings wrote a little note because I saw the little note saying, "This is going to take longer than three days."

Would she -- it doesn't mean you can't bring the application before us today, but would she not have been a better person? Because you can't realistically get into settlement -- be revealing settlement discussions to me and you're not seeking to do that at this stage. Is that not your -- would that not

have been the better time or are you perhaps thinking, "Well, we didn't have a ruling then, now we have a ruling and that gives us a power assist in this application."

MS. FRIEDMAN: Well, again, requests to resolve this pre-dated those pre-hearings. And I can't speak for Vice-Chair Meyrick, but there's a reason why she put in the third pre-hearing notes and only the third pre-hearing notes that this pre-hearing wasn't necessary. And I'm not sure about what you should do about reading in between the lines of that but, based on the request at the stay, it was my understanding that a request for costs should only be made at a hearing.

And I recognize that the loser-pay principle doesn't apply -- whatever you construe loser to mean, it doesn't apply to adjudicative proceedings. But certainly there wouldn't have been a cost application had the decision been made to uphold the penalty. And then, therefore, the request to resolve this wouldn't have been compelling because, from my perspective, then there would be a compelling argument to say the Registrar was reasonable in its original proposal.

MEMBER WILLIAMS: If we take a hypothetical case, I actually got a call today from a Detective Inspector with the Ontario Provincial Police about a prosecution that I did back in the spring and summer of 1984 involving the loss of life of a lovely lady. And the gentleman who was ultimately found guilty

following a six-week jury trial is still in custody. If, in that case, hypothetically, applications had been made to resolve the matter at an early stage of proceedings, counsel for the prosecution, in that case being me, would have the discretion, hopefully not exercised unreasonably, to decide whether or not the public interest is sufficiently protected by seeking to resolve the matter.

I think your gentleman in this matter seems to have been caught. To use the testimony of Mr. Durand, in the era where an equine working group had made a number of recommendations to soften the approach regarding what was a 90-day suspension for a horse now becoming 15 days because it unreasonably spanked owners and there are other reasons as well. In that persons who on serious matters are involved with second or third violations, according to the directive, are not going to be offered the early resolution so-called settlement proceedings.

And it appears from the evidence of Durand that your gentleman is caught in one of those situations that, because he had the prior for the TCO2 positive nine months before, that he was disentitled in their opinion to an early resolution agreement that would be less than the mandatory minimum. That's a position that may be unreasonable from your perspective and the perspective of Mr. Boyd who suffers all the sanctions here but others may not share that view.

MS. FRIEDMAN: And I completely understand that. But, with due respect to Mr. Durand, I don't think taking a hard line on that position is helpful and in the public interest to simply say, if it's a second or a third offence or potential offence irrespective of the circumstances, that it should be no resolution. I don't think that's helpful to the public interest to say, "We're not going to even consider on a case-by-case that there are extraordinary circumstances."

MEMBER WILLIAMS: Oh, I agree with you on that. Similar to my view in relation to tertiary testing which you probably heard for longer than you wished to earlier today. Anything else, Ms. Pace?

MS. PACE: No, I think I've said everything I can possibly put in front of the panel other than I don't believe it was unreasonable for the Registrar to continue on the course that they were on. I agree with Mr. Chair that there was triable issues here and a variance of the penalty does not constitute sort of -- I would say one way or the other. The Registrar acted in the public interest and the Registrar did not act in such a way that would meet the bar as to be unreasonable.

MEMBER WILLIAMS: Could I seek your assistance on two matters? Could you give me the date -- I've got the Vaughan -- what is the given name of the person in B-A-H-E-N case, please?

MS. FRIEDMAN: It was my client, Steven Bahen.

MEMBER WILLIAMS: Steven with a v or a ph?

MS. FRIEDMAN: Oh, that's -- I think it was a v.

MEMBER WILLIAMS: Do you share that view, Ms. Pace?

MS. PACE: Sorry, I'm just -- have I got the wrong one now? S-T-E-V-E-N first name and then Bahen B-A-H-E-N.

MS. FRIEDMAN: I had a 50 per cent chance of getting that (inaudible 2:22:43).

MEMBER WILLIAMS: That saved a potential loss of pace. And that was a Thoroughbred and that was 2016?

MS. PACE: Yes.

MEMBER WILLIAMS: And was that a gentleman by the name of Stanley Sadinsky.

MS. PACE: Yes.

MEMBER WILLIAMS: And the one involving Mr. Boyd I know is -- I don't know what V. stands for, but Rodney V. Boyd, that was Stanley Sadinsky as well. And could you give me the date of that one as well, please?

MS. PACE: The date of the decision, if that's what you're looking for, is -- oh, hang on. Sorry, I'm just scrolling through. The date of the cost hearing was November 20th and the ruling was made November 30, 2020.

MEMBER WILLIAMS: Excellent. Thank you. Well, I'm going to ask the resident wizards for assistance to put the fine gentlemen that I've come to know during the course of this particular proceeding into a so-called breakout room.

MR. WISKIN: I can certainly do that. No problem. How long would you like to go into the breakout room for?

MEMBER WILLIAMS: May I have 20 minutes, please?

MR. WISKIN: Twenty minutes? Okay, great. So I'll move everybody else into the ---

OFF THE RECORD AT 6:24 P.M.

(WHEREUPON A BRIEF RECESS WAS TAKEN)

ON THE RECORD AT 6:47 P.M.

MR. WISKIN: Back on the record, please.

COURT REPORTER: We're on record.

MR. WISKIN: Thank you very much. Mr. Chair, we're all here. We're on the record and ready to proceed.

MEMBER WILLIAMS: Thank you very much. Well, we're about to begin with what I would speculate might be the last ruling that I'm called upon to make in this particular proceeding but we'll await further developments.

Decision on Appellant's Motion for Costs:

Ms. Jennifer Friedman, Counsel for the Appellant,

Rodney V. Boyd, trainer of Standardbred horses, has brought a motion without paper trial, fortunately, for costs pursuant to the Horse Racing Appeal Panel Rules of Procedure for Appeals, Rule 13 and, in particular, Rule 13.1.

I'll just read into the record the relevant portions of that particular rule.

> "Where a party believes that another party in the proceeding has acted unreasonably, that party may make a request to the HRAP for costs which shall be made with notice to the other parties."

Well, notice has been dispensed with on a consensual basis. And the allegation captures the single head unreasonably, frivolously, vexatiously or in bad faith have been abandoned.

The application is not an application that relates to a particular person. It's the other party in the proceeding that -- the opposition as it were. And Ms. Nicolle Pace, of course, consents to this -- no, I'm just teasing you. Ms. Nicolle Pace has taken a position that is adverse in interest to that of Ms. Friedman on this particular issue.

The awarding of costs is a matter that's of a discretionary nature. I have the benefit of the two cases that have been cited, Steven Bahen, Steven with a v, B-A-H-E-N, decision of the Horse Racing Appeal Panel, 2016, Chair Stanley Sadinksy presiding and the decision of Rodney V. Boyd, 2020, HRAP

decision of the Chair Stanley Sadinsky.

Now, what has unfolded in this particular case following the discovery of a positive test and the various intermediate steps is that pre-trials were held on January 27, February 22 and March 4th. Hearing dates were selected and the matter proceeded on March 29, 30, 31 and April 22. Submissions were made April 26th. And today, April 29th, was selected for Reasons for Decision.

What would be day nine for the parties without the consideration of the obvious extremely well-prepared materials that have been provided to us which resulted in 1,728 pages of material and two audio tapes of interviews during the course of the investigation and a mass of authorities. I must say that most of the materials were fascinating, some were not, but all were necessary.

So this is a matter where discretion is to be exercised. I'm going to seek to adopt in relation to this matter -- so that I'll avoid putting the parties and other participants deeper into sleep, I'm going to seek to adopt what was said by me in the ruling for reasons for decision beginning at the complaints of unfairness which happens to be page 15 of my 99 pages of notes and at page 25 the claim that the outrage was trifling -- that the overage was trifling, pardon me. I can't read my own scratchy writing.

The Members of the Panel had an opportunity to review this matter in the recess that was made available. I understand the perspective and approach of counsel for the Appellant. This, as indicated in the reasons, has been a nightmare. But, from the perspective of the Panel, there is nothing that -- in the evidence that leads the Panel to any decision that the position advanced by the representative or other members of the Registrar has been unreasonable. All positions from the available evidence that we are privy to are within a reasonable range of alternatives in the prosecution of the matter. And earlier, no unfairness was found.

If there had been an approach, and there's no evidence of this, that all second or subsequent offenders are forever barred from a settlement consideration forever more, irrespective of the facts of the founding violation and irrespective of the facts of the second or subsequent violations, then, from the perspective of the Panel, that would be unreasonable and certainly could justify costs and substantial costs that are set out in the Rules.

But there is no foundation available to us upon which to make an order adverse to the Alcohol and Gaming Commission and Registrar. So that the motion or application is dismissed. Without costs, I will say.

MS. FRIEDMAN: Thank you, Mr. Chair. Thank you,

Panel Members.

MEMBER WILLIAMS: You're welcome. Is there ---

MS. PACE: Thank you, Mr. Chair.

MEMBER WILLIAMS: You're welcome. Is there anything further from any of the participants? Ms. Pace, do you have anything further you wish to address?

MS. PACE: No. Thank you, Mr. Chair. That is everything from the Registrar.

MEMBER WILLIAMS: Delightful. Ms. Friedman, do you have anything that you wish to address?

MS. FRIEDMAN: No, thank you. I hope everyone has a good evening and stays safe.

MEMBER WILLIAMS: Thank you. And to fellow members of the Panel, Mr. Charalambous?

MEMBER CHARALAMBOUS: No, I just wish everybody a good evening and stay safe again.

MEMBER WILLIAMS: Thank you. And Mr. Newton?

MEMBER NEWTON: No, thank you. I -- just thank you for everybody's submissions. They were very full. I'll leave it with that. But, yes, please stay safe. Best to your families as well.

MEMBER WILLIAMS: Thank you very much to all and to

all a good night. I think I heard that phrase somewhere before.

MS. PACE: Good night.